Hasanuddin bin Abd Hamid v Public Prosecutor

HIGH COURT (TAWAU) — CRIMINAL APPEALS NO T(41)–04 OF 2001, T(41)–10 OF 2001, T(41)–11 OF 2001, T(41)–12 OF 2001 AND NO T(41) – 13 OF 2001
RICHARD MALANJUM J
17 JANUARY 2002

Criminal Procedure *— Revision — Sentences — Whether order for concurrent sentences inadequate in circumstances of cases — Habitual offender — Whether ground for revision — Criminal Procedure Code s 325*

Criminal Procedure *— Sentencing — Concurrent or consecutive — Habitual offender — Intention of Parliament — Exercise of revisionary power under s 325 Criminal Procedure Code to increase punishment*

At the request of the learned deputy public prosecutor ('the DPP'), the court heard together several appeals by the appellant against sentences imposed on him by the learned trial magistrate in connection with the various charges preferred against him. The appellant was unrepresented. At the hearing of the appeal, the appellant did not say much other than requesting the sentences to be reduced. He also explained why he committed the offences. The learned DPP on the other hand contended that the appeal should be dismissed as the appellant was a habitual offender and urged the court to exercise its power of revision as the sentences having being made to run concurrently were manifestly inadequate in the circumstances.

Held, dismissing the appeal and ordering the revision of the sentences save for two charges:

(1) In the present case, the court did no think that the sentences meted out by the learned magistrate could be taken as excessive in the circumstances of the cases. The appellant seemed to have gone on rampages in breaking into dwelling houses, vehicle and building, to wit, a school, and taking things to be sold for profits. It was on record that only $^1/_3$ of the values of those goods taken were recovered with the balance presumably already consumed by the appellant and his sidekick who was still at large. As the learned magistrate noted, it appeared that the appellant adopted a modus operandi in carrying out his illicit activities. So his age was deceptive and it was obvious from the facts as admitted (see p 166E–G).

(2) The total length of imprisonment imposed by the learned magistrate on the appellant came up to 108 months, that was nine years. But with the order for the term to run concurrently the length of imprisonment to be served would only come up to 48 months or four years. And with remission of $^1/_3$ effectively the appellant would only be in imprisonment for a period of 32 months (two years and eight months). That was contrary to

the intention of the legislature in amending those provisions relating to the offences committed by the appellant wherein the maximum terms of imprisonment were increased with additional fines and whipping for subsequent commissions (see p 174D–F).

(3) The increment in punishment could only mean one thing, that is, that Parliament deemed it very serious the types of offences that were committed by the appellant. As to the view that only where violence was employed in the commission of the offence that whipping should be imposed, the court could not agree. The fact that Parliament had amended to increase the penalty for such an offence in particular upon second commission was indicative of its abhorrence to it (see p 174F–G).

(4) In the exercise of the revisionary power under s 325 of the Criminal Procedure Code, the court therefore proceed to vary the order of the learned magistrate thereby making the custodial sentences of the appellant to run consecutively save for two charges that were committed at the same time and place (see p 175F–G).

[Bahasa Malaysia summary

Atas permintaan penolong kanan pendaftar ('PKP') yang arif, mahkamah telah mendengar bersama beberapa rayuan oleh perayu terhadap hukuman yang dijatuhkan terhadap beliau oleh majistret yang arif berkaitan pelbagai pertuduhan yang dibuat terhadap beliau. Perayu tidak diwakili oleh sesiapa. Dalam perbicaraan rayuan tersebut, perayu tidak bercakap banyak selain daripada memohon agar hukuman-hukuman tersebut diringankan. Beliau juga menjelaskan kenapa beliau telah melakukan kesalahan-kesalahan tersebut. PKP yang arif sebaliknya menegaskan bahawa rayuan tersebut hendaklah ditolak kerana perayu merupakan seorang pesalah yang kerap dan mendesak mahkamah untuk menggunakan kuasa penyemakannya kerana hukuman-hukuman tersebut untuk dijalankan bersama sememangnya tidak mencukupi langsung dalam keadaan berikut.

Diputuskan, menolak rayuan tersebut dan memerintahkan penyemakan hukuman tersebut kecuali dua pertuduhan:

(1) Dalam kes sekarang ini, mahkamah tidak berpendapat bahawa hukuman-hukuman yang dikenakan oleh majistret yang arif boleh dikatakan melampau dalam keadaan kes-kes tersebut. Perayu dilihat telah melakukan amukan pecah rumah, kenderaan dan bangunan termasuk sekolah dan mengambil barang untuk dijual bagi mendapatkan pulangan. Di atas rekod hanya $^1/_3$ daripada nilai barangan yang dicuri yang telah diperolehi dengan bakinya kemungkinan telahpun diambil oleh perayu dan orang

kanannya yang masih bebas. Sebagaimana yang ditekankan oleh majistret, ia kelihatan bahawa perayu telah menggunakan satu modus operandi dalam menjalankan kegiatan-kegiatan haram beliau. Maka umur beliau adalah satu muslihat dan ini adalah jelas daripada fakta-fakta sebagai mana yang diakui (lihat ms 166E–G).

(2) Tempoh keseluruhan hukuman penjara yang dikenakan oleh majistret yang arif ke atas perayu adalah 108 bulan, iaitu sembilan tahun. Tetapi dengan perintah untuk tempoh tersebut dijalankan bersama maka tempoh hukuman penjara tersebut yang perlu dijalankan adalah hanya 48 bulan atau empat tahun. Dan dengan singkatan $^1/_3$ secara efektifnya perayu hanya akan dipenjarakan untuk satu tempoh 32 bulan (dua tahun dan lapan bulan). Ini adalah bertentangan dengan niat perundangan dalam meminda peruntukan-peruntukan yang berkaitan dengan kesalahan yang dilakukan oleh perayu di mana tempoh penjara maksimum ditambah dengan denda tambahan dan sebatan untuk kesalahan-kesalahan berikutnya (lihat ms 174D–F).

(3) Penambahan hukuman hanya boleh bermaksud satu perkara, iaitu, bahawa Parlimen menganggap ia serius terhadap jenis-jenis kesalahan yang telah dilakukan oleh perayu. Berhubung pandangan bahawa sebatan patut dikenakan hanya apabila keganasan digunakan dalam melakukan kesalahan, mahkamah tidak bersetuju. Hakikat bahawa Parlimen telah membuat pindaan untuk menambah penalti untuk kesalahan tersebut terutamanya kesalahan kedua menandakan betapa seriusnya kesalahan tersebut (lihat ms 174F–G).

(4) Dalam menggunakan kuasa penyemakannya di bawah s 325 Kanun Acara Jenayah, mahkamah oleh demikian mengubah perintah majistret yang arif tersebut dan dengan itu membuat hukuman-hukuman tahanan perayu untuk dijalankan berturut-turut kecuali untuk dua pertuduhan yang telah dilakukan pada masa dan tempat yang sama (lihat ms 175F–G).]

Notes

For cases on revision of sentence, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2777–2780.

For a case on concurrent or consecutive sentence, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) para 3580.

Cases referred to

Abdul Wahab v PP [1970] 2 MLJ 203 (refd)
Basir bin Badonggo & Ors v PP [1988] 2 MLJ 442 (refd)
Gek Sing a/l Kaliappan v PP [1999] 6 MLJ 641 (refd)
Gurdit Singh v PP [1983] 1 MLJ 264 (refd)
Mohamed Ali v PP [1956] MLJ 84 (refd)

Narayasamy v PP [1968] 1 MLJ 273 (refd)
New Tuck Shen v PP [1982] 1 MLJ 27 (refd)
PP v Fam Kim Hock [1957] MLJ 20 (refd)
PP v Govindnan all Chinden Nair [1998] 2 MLJ 181 (refd)
PP v Loo Chang Hock [1988] 1 MLJ 316 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Rajandran & Anor [1985] 2 MLJ 260 (refd)
PP v Tan Eng Hock [1970] 2 MLJ 15 (refd)
R v Ball (1951) 35 Cr App R 164 (refd)
Radin Ibrahim bin Gusti Yassar v PP [1988] 3 MLJ 237 (refd)
Roslan bin Haji Yahya v PP [1985] 2 MLJ 218 (refd)
Tan Teow Swee v Regina [1955] MLJ 76 (refd)
Tinit & Ors v PP (No 2) [1964] MLJ 389 (refd)
Zakariya bin Musa v PP [1985] 2 MLJ 221 (refd)

Legislation referred to

Criminal Procedure Code ss 163, 164, 325
Penal Code ss 325, 379A, 380, 457

Appeal from: Criminal Cases No TA–83–205 of 2001, TA–83–206 of 2001, TA–83–207 of 2001, TA–83–208 of 2001 and TA–83–209 of 2001 (Magistrate's Court, Tawau)

Hasanuddin bin Abd Hamid representing himself as the appellant.
Norliza Yusof (Deputy Public Prosecutor) (State Attorney General's Chambers, Kota Kinabalu) for the respondent.

Richard Malanjum J: On 4 December 2001, at the request of the learned deputy public prosecutor ('the DPP') I heard together the several appeals by the appellant against the sentences imposed on him by the learned trial magistrate in connection with the various charges preferred against him. For convenience and since the offences were similar in nature and against the same person I acceded to the request.

The charges were as follows:

(i) First charge:

Bahawa anda, pada 18 Februari 2001, jam lebih kurang 2 pagi, bertempat di TB 5527, Taman Ria 6, Jalan Utara Baru, di dalam Daerah Tawau, di dalam Negeri Sabah, telah melakukan pencerobohan bangunan pada waktu malam hari, dengan memasuki ke dalam bangunan kepunyaan Labatjo bin Tagilin, L/36 Thn Bugis, yang mana bangunan tersebut digunakan sebagai tempat kediaman, selepas matahari jatuh dan sebelum matahari keluar, dengan niat hendak melakukan kesalahan yang boleh dihukum dengan penjara, iaitu mencuri, telah mencuri:

1 sebuah handphone jenis Ericson BX 668;
2 sebuah mesin taip jenama Olympia;
3 sebuah kamera jenama Pentax; dan
4 sebuah beg berisi peralatan pembelajaran

A yang berharga lebih kurang RM1,200, kepunyaan Labatjo bin Tagilin, L/36 Thn Bugis, oleh itu anda telah melakukan kesalahan yang boleh dihukum di bawah s 457 Kanun Keseksaan.

(ii) Second charge:

Bahawa anda, pada 3 April 2001, jam lebih kurang 2 pagi, bertempat di Flat B Guru SMK Tawau, Jalan Kg Jawa, di dalam Daerah Tawau, di dalam Negeri Sabah, telah melakukan di dalam bangunan yang digunakan sebagai tempat kediaman orang telah mencuri:

1 KPT No 640517– 2–5435;

2 KPT No 660513–12–5196;

C 3 lesen Memandu Kelas 'D';

4 telefon bimbit jenis Ericson No 019–6917664;

5 telefon bimbit jenis Motorolla No 019–8336819;

6 barang kemas bernilai RM400; dan

7 wang tunai RM550

D yang berharga lebih kurang RM1,400 kepunyaan Mohd Maksid bin Masrie, tanpa kebenarannya, oleh itu anda telah melakukan kesalahan yang boleh dihukum di bawah s 380 Kanan Keseksaan.

(iii) Third charge:

Bahawa anda, pada 9 April 2001, jam lebih kurang 3 pagi, bertempat di TB E 5561, Taman Ria 6, Jalan Utara Baru, di dalam Daerah Tawau, di dalam Negeri Sabah, telah melakukan pencerobohan bangunan pada waktu malam hari, dengan memasuki ke dalam bangunan kepunyaan Azunizad bin Aziz, L/23 thn Melayu, yang mana bangunan tersebut digunakan sebagai tempat kediaman orang, selepas matahari jatuh dan sebelum matahari keluar, dengan niat hendak melakukan kesalahan yang boleh F dihukum dengan penjara, iaitu mencuri, telah mencuri barang-barang seperti berikut:

1 sebuah topi keledar, warna kelabu gelap;

2 sebuah kamera, jenis Canon warna hitam;

3 sebuah telefon bimbit, jenis Siemens C25;

G 4 kad Kredit Public Bank;

5 kad ATM Bank Bumiputra;

6 kad ATM Sabah Bank; dan

7 wang tunai sebanyak RM400

yang berharga lebih kurang RM1,340, kepunyaan Azunizad bin Aziz L/23 thn H Melayu, oleh itu anda telah melakukan kesalahan yang boleh dihukum di bawah s 457 Kanun Keseksaan.

(iv) Fourth charge:

Bahawa anda, pada 9 April 2001, jam lebih kurang 3 pagi, bertempat di TB 5561, Taman Ria 6, Jalan Utara Baru, di dalam Daerah Tawau, di dalam I Negeri Sabah, telah mencuri sebuah motosikal nombor ST 5928 E jenis Honda Ex 5, yang berharga RM3,000 kepunyaan Azunizad bin Aziz tanpa izinnya, oleh itu anda telah melakukan kesalahan yang boleh dihukum di bawah s 379A Kanun Keseksaan.

(v) Fifth charge:

Bahawa anda bersama seorang lagi yang masih bebas, pada 12 April 2001, jam lebih kurang 1 pagi, bertempat di Tingkat 2B, Flat Guru SMK Kuhara, Jalan Kuhara, di dalam Daerah Tawau, di dalam Negeri Sabah, dengan niat bersama, telah melakukan pencerobohan bangunan pada waktu malam hari, dengan memasuki ke dalam bangunan kepunyaan Samsu Bin Kullu, L/31 Thn Bugis, yang mana bangunan tersebut digunakan sebagai tempat kediaman, selepas matahari jatuh dan sebelum matahari keluar, dengan niat hendak melakukan kesalahan yang boleh dihukum dengan penjara, iaitu mencuri, telah mencuri sebuah dompet jenama YSL, warna hitam yang mengandungi:

1 wang tunai RM 720;

2 sekeping KPT No 700810–12–5583 atas nama Samsu bin Kullu;

3 sekeping lesen memandu kelas 'D' atas nama Samsu bin Kullu;

4 sekeping sijil lahir kepunyaan Samsu bin Kullu; dan

5 lima keping Kad ATM (Hong Kong Bank, Hong Leong Bank, Giro, Public Bank dan Maybank)

yang berharga lebih kurang RM750, kepunyaan Samsu bin Kullu, L/31 Thn Bugis, oleh itu anda telah melakukan kesalahan yang boleh dihukum di bawah s 457 Kanun Keseksaan dan dibaca bersama s 34 Kanun yang sama.

(vi) Sixth charge:

Bahawa kamu, pada 4 Mac 2001, jam lebih kurang 1 pagi, bertempat di Sekolah Kebangsaan Tanjong Batu Keramat, di dalam Daerah Tawau, di dalam Negeri Sabah, telah melakukan pencerobohan bangunan pada waktu malam hari, dengan memasuki ke dalam Sekolah Kebangsaan Tanjong Batu Keramat, yang mana bangunan tersebut digunakan sebagai tempat menyimpan harta, selepas matahari jatuh dan sebelum matahari keluar, dengan niat hendak melakukan kesalahan yang boleh dihukum dengan penjara, iaitu telah mencuri:

1 sebuah radio jenama Panasonic;

2 sebuah gitar kayu; dan

3 lima keping cek Bank Islam

yang berharga lebih kurang RM2,000, kepunyaan Sekolah Kebangsaan Tanjong Batu Keramat, oleh itu anda telah melakukan kesalahan yang boleh dihukum di bawah s 457 Kanun Keseksaan.

Briefly, the facts as admitted by the appellant in respect of each of the charges are as follows:

(i) For the first charge, it was admitted that on 18 February 2001 at about 2am the appellant entered alone the house of the complainant, Labatjo bin Tangilin, with the intention to steal. He went through the window by removing the glass louvers and cutting the mosquitoes netting. Once inside he managed to take the items as per charge. Then he left the place and went to Kunak where he gave the camera to his friend and the rest he took home. Investigation revealed that he threw away the handphone while the typewriter was subsequently handed to the Police by his father. As for the camera it was discovered that it was

sold for RM30. It was subsequently recovered from a lady on 16 April 2001. The estimate loss was put at RM900. That did not take into account the damage to the window of the complainant.

(ii) In respect of the second charge, investigation revealed that on 3 April 2001 at around 2am the appellant entered the Teachers' Flat of SMK Tawau along Jalan Jawa, Tawau and managed to take the items belonging to the complainant. The estimated total loss was put at RM1,400. But that amount did not take into account the inconvenience for the loss of the identity cards and driving license. The handphone was recovered.

(iii) As for the third and fourth charges, the facts as admitted by the appellant were that on 9 April 2001 at around 3am he gained entry into the dwelling house of the complainant by climbing from a window and into the ceiling of the house through the gap between the wall and the roof. Thereafter, he removed the cover of the opening of the ceiling found in the toilet of the house. While inside he took the wallet, camera, handphone and so forth. And on his way out through a door that he had opened the appellant also took the motorcycle of the complainant. The estimated loss was put at RM4,340. The items recovered were the motorcycle, the helmet, the handphone and the camera. That was possible when the police managed to go to an unnumbered house at Lorong Mohd Salleh, Batu 2, Jalan Apas, Tawau on 13 April 2001 following a tip-off.

(iv) For the fifth charge the facts as presented by the prosecution were that on 12 April 2001 at around 1am the appellant with another accomplice who is still at large but known as Faizel, went to the compound of SMK Kuhara Tawau with the intention to commit theft. But having entered the school building his accomplice waited for the appellant at the school hall while he went into one of the teachers' apartment. The appellant entered the apartment of the complainant by climbing to the kitchen corridor of the building. Then he removed the glass louvers to gain entry. While inside the apartment the appellant took the items as listed in the charge. And in the course of him doing that the complaint was awaken. On seeing the appellant inside the apartment the complainant shouted and the appellant fled the scene via the entry window. But that did not prevent him from carting away the items such as the identity card, birth certificate and driving license of the complainant. Five ATM cards of the complainant were also taken along with cash of RM720 which amount was considered as the estimated loss of the complainant. Obviously, the inconvenience of losing the other documents was not taken into account but such loss in my view does have more impact at times than actually losing cash. Moreover, the shock felt by the complainant on seeing the appellant ransacking his apartment in wee hours of the morning must have been quite an experience.

(v) And finally for the last charge, it was admitted by the appellant that on 4 March 2001 at around 1am he went to SK Tanjong Batu Keramat,

Tawau, with the intention to commit theft. He climbed over the school fence and into the teacher's room by climbing into the ceiling of the building. While inside he took the items as per charge and brought them back to his rented house at Mile 2 Jalan Apas, Tawau. None of the items taken were recovered from the appellant and the estimated loss was put at RM2,000.

(vi) The appellant was apprehended on 12 April 2001 at 11pm along Jalan Habib Sheikh, Tawau by the police acting on information.

(vii) At the time of convictions on the above charges the appellant was already serving two sentences of imprisonment for offences under s 457 of the Penal Code ('the Code') whereby for the first offence he was sentenced to 24 months imprisonment and for the second offence he was sentenced to 42 months imprisonment. The sentences were ordered to run concurrently and that he would be due for release on 25 August 2003.

Following the respective convictions of the appellant upon pleas of guilty to each of the charges as per para 2 above, he was sentenced as follows (the sequence herein as per the charges):

(a) ten months imprisonment;

(b) 12months imprisonment;

(c) 24 months imprisonment and one stroke of the rattan;

(d) 30 months imprisonment;

(e) 48 months and fined RM2,000 in default two months imprisonment; and

(f) 48 months with two strokes of the rattan.

The above sentences would run concurrently and to take effect after the sentences on LDA (83) 123/2001 and LDA (83) 124/2001 have been served.

The appellant was dissatisfied with the sentences imposed and appealed to this court. He was unrepresented.

At the hearing of the appeal the appellant did not say much other than requesting that the sentences be reduced. He also explained why he committed the offences. The learned DPP on the other hand contended that the appeal should be dismissed as the appellant was a habitual offender. She also urged the court to exercise its power of revision as the sentences having been made to run concurrently were manifestly inadequate in the circumstances. To this request the appellant did not say much as indeed throughout the proceeding he only requested for the reduction of the sentences imposed.

Having heard the matter as a whole including the request to have the sentences revised, I dismissed the appeal of the appellant and granted the request by the learned DPP that I should exercise my revisionary power under s 325 of the Criminal Procedure Code ('the CPC').

Upon revision the concurrent order for the sentences to be served was set aside and substituted with an order that the sentences would run consecutively save for the sentences on the Criminal Appeal No T(41)–11 of 2001 which would remain to run concurrently. In addition the number of strokes was increased in that for Criminal Appeal No T(41)–11 of 2001 it was increased to four strokes of the rattan and for Criminal Appeal T(41)–13 of 2001 it was increased to three strokes of the rattan.

I also indicated that in the event of further appeal I would give my grounds.

The appellant is dissatisfied with the dismissal of his appeal and the enhancement of his sentences and has therefore filed a notice of appeal to the Court of Appeal. Accordingly, this is my grounds in coming to my decision as I did.

To begin, I must state here that when I first perused the notes of proceedings I had reservation on the procedure adopted by the learned magistrate when hearing the cases against the appellant bearing in mind ss 163 and 164 of CPC. But on being assured that each of the charges was dealt with individually though the recording of the full transcripts was done on one particular docket such reservation was tapered. Anyway, the basic elements of the trials seemed to have been recorded separately. Only the details were recorded in one docket and hence I was of the view that such step would not have caused any prejudice or injustice to the parties. Accordingly, I did not deem it necessary to set aside the proceedings and to order retrials. And to do so would have further added to the current problems arising from the shortage of magistrate and would have delayed the disposal of these cases. Of course, I would have done so regardless if the situation warranted as justice should never be sacrificed for whatsoever reason.

And before me the appellant requested that his sentences be reduced without making any effort in showing why. In fact, he did not say much and only spoke when prodded. All he did was to tell me another story which he never did before the learned magistrate. He seemed to me that he was justifying what he did and my impression of him was that he was far from remorseful for what he had done. As indeed before the learned magistrate, he seemed to be quite familiar with the justice system as I noted that he even went to the extent of asking for all the sentences to run concurrently including those he was serving relating to earlier convictions despite being unrepresented and at the age of 23 years old to boot. At any rate, I did consider his explanation, namely, to get funds to look for his wife who was kept away from him by his in-laws, but that did not match with the strings of burglaries of dwelling houses and public building committed within a span of three to four months. And he had an accomplice who is still at large in the commission of one of the offences. Surely, the appellant could have secured a job as he is not a disabled person if indeed he required the money to look for his wife.

From her grounds of judgment, I find that the learned magistrate did consider all the circumstances including those favourable to the appellant. She listed several factors in coming to her decision in sentencing the appellant as she did. Those factors, inter alia, were that the appellant was a habitual offender with modus operandi in selecting the victims of his crimes, that the appellant was noted for carrying his activities in the rural areas and was still serving his terms for those offences, that the age of the appellant was taken into account while at the same time the appellant was found to be physically fit to serve the punishment, that in allowing the appellant to serve his sentences concurrently the appellant would have benefited from the discount of the total term of imprisonment he would have to undergo for the offences he had committed, that the categories of offences that were committed by the appellant were rampant as could be seen from the fact that within the period of three months the appellant managed to burgle four dwelling houses and a building, that in sentencing the appellant it was hoped that he would learn his lesson and as deterrent to would be offenders and that from the crimes committed the appellant profited from them and losses to the victims without any chance of being compensated. From the foregoing I would say that the learned magistrate had taken the relevant factors and I would further say that she seemed to have gone to the far end of the lenient side of the scale in that the sentences were made to run concurrently. But I will deal with this point later.

Now, it is settled law that an appellate court is not to interfere with a sentence passed by a trial court unless it is wrong in law or is manifestly excessive or inadequate in the circumstances of the case (see *R v Ball* (1951) 35 Cr App R 164; *PP v Loo Choon Fatt* [1976] 2 MLJ 256; *PP v Fam Kim Hock* [1957] MLJ 20; *New Tuck Shen v PP* [1982] 1 MLJ 27).

In the present case, I do not think that the sentences meted out by the learned magistrate can be taken as excessive in the circumstances of these cases. And as stated earlier that the appellant seemed to have gone on rampages in breaking into dwelling houses, vehicle and building, to wit, a school, and taking things to be sold for profits. It is on record that only $^{1}/_{3}$ of the values of those goods taken were recovered with the balance presumably already consumed by the appellant and his side kick who is still at large. As the learned magistrate noted, it appeared that the appellant adopted a modus operandi in carrying out his illicit activities. So his age is deceptive and it is obvious from the facts as admitted that led the way.

In considering these cases, I was reminded of what was said by his Lordship Vincent Ng J in the case of *Gek Sing a/l Kaliappan v PP* [1999] 6 MLJ 641 at p 650:

> In dispensing justice, magistrates should not be oblivious of the feel of temperature outside their courts and continue to adopt the same approach in sentencing while (as here) there is laughter in the air outside by certain characters on their way to the bank. Counsel for the applicant had submitted that as the accused was a first offender, the learned magistrate ought not have imposed a term of imprisonment. This may be quite so, in fact patterns of normal cases. Indeed, I could not have agreed more with this approach when, in *Goh Kheng Seong v PP* [1993] 1 MLJ 103, I had occasion to say:

A 'In short, there should be sufficient culpability on the part of the accused to justify imprisonment. This ought to be so as the court has to bear in mind that sending a motorist to prison, especially for a substantial term, would entail his having to commune and react with characters of an entirely different kind and may thus emerge from prison metamorphosed into a personality, the worse for society. Here, I am mindful of Professor
B TTB Koh's stimulating speech on a plea for penal reform which he delivered to the Kiwanis Club Singapore on 18 April 1972, wherein he expressed his concern about the probable 'corrupting influence of the inmate sub-culture', and which is reproduced in [1972] 1 MLJ lvii. This itself is inimical to public interest.'

However, just as the contention that the provision for minimum mandatory
C imprisonment in a non-capital case is anathema to criminal jurisprudence, so also, we must be mindful that there is no law which precludes the magistrate, in a given peculiar set of circumstances, from imposing a term of imprisonment even for first time offenders. Thus, when sentencing in certain exceptional cases, the court may factor into its deliberations on the question of public interest, not only patent but also latent circumstances that may
D operate for or against the accused person.

Certainly, given the above fact matrix, even the appellant's counsel would concede that the learned magistrate had consciously carried out a carefully considered and calculated exercise of his discretion to mete out, what was to him, a condign penalty while constrained by the then prevailing circumstances, with the sole objective of deterring humdrum recurrence of
E such offences.

Thus, this court is entirely satisfied that the sentence of the fine coupled with imprisonment imposed by the learned magistrate was not manifestly excessive under the circumstances of the case and he had adequately taken into consideration — certainly, mulled over — all the relevant factors necessary to maintain an equitable balance between prosecution and the
F offender. Quite obviously, the prevalence-of-offence factor had indeed tipped the scales in favour of a custodial penalty. I therefore dismissed the appeal after applying the above guidelines to the present case.

However, confronted with the unfortunate fact disclosed in the appeal record that about 1,893 snakes had died while awaiting disposal resulting in undue hassle on the authorities (as pointed out by the learned deputy), and
G considering that the maximum term of imprisonment allowed under the relevant sections is three years, I then called upon the defence to show cause why this court should not exercise its powers of revision under s 325 of the Criminal Procedure Code to enhance the term of imprisonment. And, after having heard counsel, I decided that as a forewarning to characters of the appellant's ilk, this was a proper case to invoke s 325 to increase the respective
H seven days period of imprisonment to 14 days on each of the three charges, all to be served by the appellant concurrently. And it was so ordered.

I am in complete agreement with his Lordship in his observation in that in the present cases, for instance, it is obvious that the appellant must have gone to the 'bank' laughing as only one-third of the loots were
I recovered.

For the above reasons, I did not find any basis to allow the appeal of the appellant against the sentences imposed and hence dismissed it.

During the hearing of the appeal of the appellant the learned DPP urged me to exercise my revisionary power to vary the order of the learned magistrate so that the sentences would run consecutively instead of concurrently and that the number of strokes of the rattan imposed on the appellant should also be reviewed. Learned DPP explained why the prosecution could not appeal in time. She said that the investigation papers were sent to her office on piece meal basis and so the sentences were considered individually. I was satisfied with the explanation and if one were to only consider each of the charges individually the magnitude of the crimes would not be apparent. From the charges and the facts as presented and admitted by the appellant, it would not be far fetched to categorize the offences as one of serial in nature. And as indicated above, my impression of the appellant was that he was not remorseful for what he had done. He was only interested in getting a light punishment but was not willing or even prepared to give a credible reason for his request. He did not say much even when the learned DPP asked for the sentences to run consecutively. And as found by the learned magistrate, the appellant appeared to have adopted a system in selecting his victims and obviously therefore the crimes were premeditated.

The charges preferred against the appellant relate to offences of which the punishments provided are as follows:

(i) for s 457 of the Code the penalty is a mandatory imprisonment 'for a term which may extend to five years, and shall also be liable to fine, and if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years; and for every second or subsequent offence shall in either case be liable to fine or whipping.'

(ii) for s 379A of the Code the penalty is a mandatory 'imprisonment for a term of not less than one year and not more than seven years, and shall also be liable to fine.'

(iii) for s 380 of the Code the penalty is a mandatory 'imprisonment for a term which may extend to ten years, and shall also be liable to fine, and for a second or subsequent offence, shall be punished with imprisonment and shall also be liable to fine or to whipping.'

Out of the six charges preferred four were under s 457 of the Code.

From some of the past cases, it would appear that the range of imprisonment for an offence under s 457 of the Code was between six months to ten years imprisonment with or without additional fines or strokes of the rattan even where the accused pleaded guilty. See:

(a) *Tan Teow Swee v Regina* [1955] MLJ 76 — Spencer-Wilkinson J increased the sentence from six months imprisonment to twelve months imprisonment on an accused who was convicted of an amended charge from s 457 to s 380 of the Code. The subject matter involved was only 12 sacks of tea bags. There was a trial in this case.

In passing sentence the learned judge said this at p 78:

> The learned Deputy Public Prosecutor pressed upon me that from any point of view and whether the offence was in respect of 12 or 26 sacks of tea dust a sentence of six months' imprisonment was, in view of the previous convictions of the accused, manifestly inadequate; and in spite of the eloquent plea put forward on behalf of the appellant by his counsel I could not but agree with the submission of the Deputy Public Prosecutor.
>
> It may be that the learned President went rather too far in assuming the possibility of mitigating circumstances, but he cannot in my opinion be blamed for this as the desertion of the appellant by counsel at the trial placed the learned President as well as the appellant in a very difficult position.
>
> I therefore felt it my duty to enhance the sentence, and taking into consideration the fact that the charge stood only as one in respect of 12 bags of tea dust I increased the sentence from one of six months' imprisonment to one of twelve months' imprisonment.

(b) *Abdul Wahab v PP* [1970] 2 MLJ 203 — Justice Sharma enhanced the sentence of the accused to ten years imprisonment for a conviction on his own plea of guilty under s 457 of the Code. The accused had twelve previous convictions. At pp 204–205, his Lordship said this, inter alia:

> The appellant has given me no satisfactory explanation or put forward any reasonable plea why the sentence of imprisonment should not be enhanced in this case. I am of the view, looking at the previous history of the appellant and his whole criminal record right from his childhood days, that he has proved himself incorrigible. A great part of his adulthood has been spent in prison and it may perhaps do the society some good if he is kept away from the public. I therefore set aside the order of the learned magistrate and substitute therefore a sentence of ten years' imprisonment and six strokes of the rattan followed by 12 months' police supervision. I would have preferred to put him under a longer police supervision but as this is an appeal which is by way of a retrial I am of the view that I should not impose upon him a punishment higher than what the learned magistrate could have imposed, or subject him to such period of police supervision which the learned magistrate could not have lawfully subjected him to.

(c) *PP v Rajandran & Anor* [1985] 2 MLJ 260 — three charges of housebreaking and theft committed. The accused pleaded guilty to the charges preferred against them. The trial court only imposed fines on all the offences. His Lordship Chan J (as he then was) called for the cases to be revised. Subsequently the sentences were enhanced to eighteen months, two years and two and half years imprisonment for each of the charges and to run concurrently. As for the fines they were set aside. But then again this case was decided even before the penalty under s 457 was increased. In his judgment the learned judge said this at pp 260–262:

Burglary in the form of housebreaking is a very serious crime indeed. When one considers the extent to which housebreaking is rife at the present time then the courts inevitably must take a serious view. Because of the prevalence of this class of crime it must necessarily attract an immediate sentence of imprisonment. The public are entitled to be protected against burglars and they are not likely to be protected if lenient sentences are passed on such offenders. This is what Lawton LJ said in *Reg v Smith* (1978) 67 Cr App R 211 at p 212:

> 'It may be necessary to set out and stress the reasons why at the present time offences of this kind should be dealt with severely and usually by a custodial sentence. It is within the knowledge of this court, and the criminal statistics bear it out, that one of the growth criminal industries in this country is burglary. The particular type of burglary which is becoming very common indeed is breaking into other people's homes. On all sides members of the public, if they have not been burgled themselves, hear that their friends and relatives have been. This court knows that when there is a burglary in a house great distress is caused. Not only is there a loss of property but there is induced a feeling of insecurity. This court knows that when the householders are women they sometimes worry a great deal about what has happened to them. It has been said, and rightly said, that when a house has been burgled it never seems the same again.'

Where persistent burglars have deliberately set out to break into other people's homes to steal their possessions with the intention of disposing them, the kind of sentence which was passed in this case by the magistrate was not realistic.

Let it be repeated: it may be necessary to set out and stress the reasons why at the present time offences of this kind should be dealt with severely and usually by a custodial sentence. Burglary in the form of breaking into other people's homes is becoming very common indeed. On all sides members of the public, if they have not been burgled themselves hear that their friends and relatives have been. When there is a burglary in a house, it is frequently turned upside-down. Burglary in the form of housebreaking is a very serious crime indeed. Offenders are not likely to be discouraged by sentences which do not involve loss of liberty.

What ought to be the proper length of sentence? 'A good deal depends upon the concept of what is necessary. There are of course the classical considerations relevant to all sentences: retribution, deterrence, prevention and rehabilitation.' — said Lawton LJ in *Reg v Davies* (1978) 67 Cr App R 207 at p 210.

As I have already stressed in this judgment, burglary of private dwelling houses is a very grave crime indeed. The retribution element is very strong in this case. I am satisfied that in most cases fines are not sufficient punishment for this class of crime. The time has come when those who indulge in breaking into other people's homes to steal their possessions must expect to receive sentences of longest terms of imprisonment. ...

The deterrent element is very strong in the present case. As was said by Lawton LJ, burglars may very well be put off by deterrent sentences.

A Deterrent sentences are of considerable value where crime is premeditated.

From the record, it appears that neither Rajandran nor Ragupathi has ever been given a sentence of immediate imprisonment. 'As a general rule it is undesirable that a first sentence of immediate imprisonment should be very long, disproportionate to the gravity of the offence and B imposed ... for reasons of general deterrence, that is as a warning to others. The length of a first sentence is more reasonably determined by considerations of individual deterrence' said MacKenna J in *Reg v Curran* (1973) 57 Cr App R 945 at pp 947–948. It is right that they should receive substantial sentences for this class of crime but a sentencing court must be careful not to pass a sentence which is disproportionate to the C gravity of the offence. It is undesirable that a first sentence of immediate imprisonment should be imposed for reasons of general, as opposed to individual, deterrence. But it might be said that a thief who is minded to break into other people's homes to steal their goods is not likely to be deterred by the fact that he may get three years rather than two years or six years rather than three years. The hearing of prison gates closing behind him is an experience which he does not want again. That is right, D but what has got to be maintained is this; if persistent burglars are caught they will be punished and punished very severely. Therefore it must be made clear that anyone found deliberately breaking and entering homes for the purpose of stealing substantial quantities of goods for disposal must expect a severe sentence.

E (d) *PP v Loo Chang Hock* [1988] 1 MLJ 316 — his Lordship Zakaria Yatim J (as he then was) imposed sentences of two years imprisonment for each of the charges under s 457 of the Code although he ordered them to run concurrently. There the accused had no previous conviction. He pleaded guilty to the charges brought against him. But the learned judge took a serious view of the fact that F the offences were committed within three days apart and that there was premeditation in their commissions. The loss and the modus in carrying out the offences were also taken into account. At p 318 of the judgment his Lordship said:

In my opinion, the element of public interest was considered for the G purpose of passing a deterrent sentence. See *R v Ball* (1952) 35 Cr App R 164. But what the magistrate had in mind was reformative punishment. If the purpose of punishment was to reform the respondent, the magistrate should have bound him over for a period of up to three years. Instead, the magistrate ordered a short term imprisonment of six months. In his grounds of judgment, the magistrate also stated that his sentences H were not adequate.

In the circumstances, this is a proper case for the court to interfere with the sentences passed by the magistrate. The next question to consider is, what is the proper punishment to be imposed on the respondent?

I In both these cases, a retributive punishment has no application. Preventive punishment, too, is not an appropriate punishment. The question is whether reformative punishment is appropriate in the instant case. In my opinion, in view of the fact that the respondent had

committed two serious offences within a period of three days, reformative punishment is not an appropriate punishment. It will be recalled that he committed the first offence on 11 December 1984 between 2am and 7am. The second offence was committed on 14 December 1984 at 3.22am, three days after the first offence was committed. In the circumstances, the proper punishment is a deterrent punishment. The main aim of deterrent punishment is to protect the public interest: *R v Ball* at p 165. It is generally accepted that the purpose of deterrent punishment is to deter others as well as to deter that particular criminal, in this case the respondent, from committing crime again: *R v Ball.* See also *R v Sargeant* (1974) 60 Cr App R 74. Under what circumstances does the court impose a deterrent sentence? A deterrent sentence is of little value if it is passed in respect of an offence which is committed on the spur of the moment. In the instant case, both the offences were committed with premeditation and planning. The respondent and the other person at large brought together with them the equipment in order to effect entry into the premises. The offences were committed deliberately and with professional skill. It was not done on the spur of the moment. A deterrent sentence is, therefore, appropriate in this case since there was clearly premeditation. Premeditated crimes include crimes of burglary, robbery and use of firearms. See *R v Sargeant* (1974) 60 Cr App R 74 at p 77.

In this case, having taken into consideration the amount of goods stolen, the modus operandi of the respondent in committing the offences and the other relevant factors, I order that the respondent be sentenced to two years' imprisonment, in respect of the first case and two years' imprisonment in respect of the second case. Both sentences are to run concurrently. The respondent had already served six months. The remaining period will be served from today.

In addition to the custodial sentences, it is also necessary to impose a fine in respect of each of the offences. First of all, the value of the goods stolen was $70,000. Secondly, the respondent must have made a large profit from the offences committed. In view of the circumstances in this case, it is justified to impose a fine on each of the offences. See *Zakariya bin Musa v PP* [1985] 2 MLJ 221. I accordingly order that the respondent be fined, in addition to the prison sentences, $5,000 in respect of each case, in default one year's imprisonment.

I must add here that in enhancing the sentences, I have not overlooked the fact that the respondent was a first offender, that he was eighteen years old and that he pleaded guilty to the charge in both cases. I have taken into consideration all these factors as well as the facts and circumstances of the two cases.

(e) *Basir bin Badonggo & Ors v PP* [1988] 2 MLJ 442 — a case from Brunei where the appellate court there affirmed the sentence of the accused to four years imprisonment for an offence under s 457 — housebreaking. They pleaded guilty in the lower court.

(f) *Radin Ibrahim bin Gusti Yassar v PP* [1988] 3 MLJ 237 — his Lordship Chong Siew Fai J (as he then was) upheld the sentence of six months for an offence under s 457 of the Code. No previous conviction and only one charge preferred against the accused. The accused also

A cooperated with the police and pleaded guilty to the charge. It was observed that a conviction under s 457 entailed a custodial sentence in view of the penalty provided therein.

It seems to me that the common ground of the above cases is that all the sentencing courts thereof have taken the view that burglary especially at B night should be taken as a very serious offence that attracts custodial punishment even for a first offender and despite the guilty plea. And such view was held even before the amendment to the penalty for an offence under s 457 of the Code. Further, not only material losses to the victims were considered but also the traumatic effect of having being burgled.

C

As for s 379A of the Code it is relatively a new provision added in to meet the increasing incidents of theft of vehicles. The imposition of a minimum period of imprisonment is mandatory.

And the term of imprisonment for such offence in previous cases ranged from one year which is mandatory to the maximum term of seven years of D imprisonment. See:

(a) *PP v Govindnan a/l Chinden Nair* [1998] 2 MLJ 181 — a conviction under s 379 of the Code on a repeat offender the High Court on appeal by the Prosecution increased the sentence to a maximum of seven years imprisonment. The accused pleaded guilty to the E charge.

(b) *PP v Wong Chak Heng* [1985] 1 MLJ 457 — two charges of theft of spare parts of motor vehicle led the accused on appeal by the Prosecution to face eighteen months imprisonment plus a fine of RM200 for the first offence and a term of two years imprisonment for F the second charge plus fine of RM300. The accused pleaded guilty as well.

(c) *Zakariya bin Musa v PP* [1985] 2 MLJ 221 — the accused on his own plea of guilty was initially sentenced to two and the half years imprisonment plus a fine of RM3,000 in default six months G imprisonment for a theft of a motorcar. This was before the inclusion of s 379A of the Code. The High Court on appeal set aside the fine but not the imprisonment. Police supervision for 12 months was also ordered.

(d) *PP v Tan Eng Hock* [1970] 2 MLJ 15 — theft of a motorcar. After pleading guilty to the charge the trial court ordered a binding over but H the High Court on appeal varied the sentence to one of 18 months imprisonment. The appellate court took into account the rampancy of car theft.

(e) *Narayasamy v PP* [1968] 1 MLJ 273 — the accused had 22 previous convictions and the trial court imposed a sentence of twelve months I imprisonment although it was mindful of imposing three years. On appeal the High Court enhanced the sentence to three years imprisonment. The accused pleaded guilty to the charge.

In respect of s 380 of the Code the previous cases seem to indicate that the usual punishment imposed ranges from one year to three years. See: A

(a) *Mohamed Ali v PP* [1956] MLJ 84 — accused had previous convictions and was therefore sentenced to one year imprisonment. However the order of six strokes of rattan was set aside on appeal as the learned judge was of the opinion that whipping should only be imposed where there was violence involved. B

(b) *Tinit & Ors v PP (No 2)* [1964] MLJ 389 — the accused after pleading guilty was sentenced to 15 months imprisonment.

(c) *Gurdit Singh v PP* [1983] 1 MLJ 264 — on revision the charge was amended to s 380 from s 454 of the Code. Subsequently the accused was sentenced to three years imprisonment. The accused claimed trial on the initial charge. C

(d) *Roslan bin Haji Yahya v PP* [1985] 2 MLJ 218 — his Lordship Gunn Chit Tuan J (as he then was) affirmed the sentence of two years imprisonment. The accused was charged and convicted on his plea of guilty for stealing crockery from his father's house. And he had a previous conviction of stealing his father's watch. D

The total length of imprisonment imposed by the learned magistrate on the appellant comes up to 108 months, that is, nine years. But with the order for the term to run concurrently the length of imprisonment to be served would only come up to 48 months (four years). And with remission of $^1/_3$ effectively the appellant would only be in imprisonment for a period of 32 months (two years and eight months). That in my view is contrary to the intention of the legislature in amending those provisions relating to the offences committed by the appellant wherein the maximum terms of imprisonment were increased with additional fines and whipping for subsequent commissions. The increment in the punishments can only mean one thing, that is, that Parliament deemed it very serious the types of offences that were committed by the appellant. As to the view that only where violence was employed in the commission of the offence that whipping should be imposed, with respect, I cannot agree. The fact that Parliament has amended to increase the penalty for such an offence in particular upon second commission is indicative of its abhorrence to it. Further, it would have been stipulated in the amendment if that was in mind. I do not think it is justified to add to the provision words or conditions which are not there in the first place. E F G

I was therefore in agreement with the learned DPP that ordering the sentences to run concurrently made the punishment meted upon the appellant disproportionate to the offences committed and thus manifestly inadequate in the circumstances. Incidentally and just for comparison purpose, it may be appropriate here to recall some of the punishments meted out by the same learned magistrate on similar cases. For instance, around the same period when the cases of the appellant were heard there were two earlier charges (TA–83–41–2001 and TA–83–42–2001) under s 379 of the Code preferred against two accused. On the plea of guilty the H I

A accused were respectively sentenced to 24 months imprisonment with one stroke of the rattan for the first charge and another 40 months with two strokes of the rattan for the second charge with the sentences of imprisonment to run consecutively. These sentences were to run after the accused have served their sentences in their convictions wherein the first accused has two and the second has one. And taking the view that the B sentences in those cases were appropriate, in the circumstances I dismissed the appeal by those accused. So if these two sets of cases are compared there seems to be a dichotomy in the punishments meted out. In the case of the appellant, he committed a string of burglaries and theft. He has previous convictions as well. And the ways he executed the tasks could be said to be C well-performed in that he had shown his agility in climbing, entering into a building, taking the items he wanted and escaping without difficulty. Thus, it is my view that there should at least be some semblance of consistency in our sentencing process. And I think that is why the request by the learned DPP for the custodial sentences of the appellant to be made consecutive is justified. Furthermore, judging from the sentences in the cases referred D hereinabove a longer term of imprisonment for the appellant would be in tandem with the current demand of public interest. The learned magistrate had acknowledged the rampancy of burglaries and theft in the district of Tawau. I do not think such observation can be doubted if one goes by the daily reports in the print media. Such incidents have been exacerbated by the presence of large population of foreigners, legal and illegal in the district. E That fact itself should be considered by the courts as a distinguishing factor of the district when comes to dealing with the offences of burglary and theft. Lenient punishment may be misinterpreted as acceptance by the local population of such a crime as being unavoidable and of trivial nature. Hence, a clear message should be sent to those would be offenders that a F lengthy custodial sentence awaits them if they are convicted for such offences as burglary and theft.

Accordingly, in the exercise of my revisionary power under s 325 of the Code, I proceeded therefore to vary the order of the learned magistrate thereby making the custodial sentences of the appellant to run consecutively G save for the two charges as indicated above since there the offences were committed almost at the same time and place. But with the remission the appellant will only serve a period of six years and two months for the default in paying a fine of RM2,000 in one of the subsequent offences under s 457 of the Code. And in order to highlight the seriousness of the crimes I also increased the strokes of the rattan as indicated above. In varying the order, H it was also in the forefront of my mind, the mitigating factors as raised by the appellant including the fact that he pleaded guilty to the charges. Unfortunately, there was nothing on record that he co-operated with the Police during the investigation of the crimes committed.

In coming to my decision as I did, I also took into account several other I factors in addition to what were considered by the learned magistrate and what I have stated above. In giving the appellant more time in prison, it was not intended for retribution and deterrent effects only. I had in mind as well

that perhaps while in custody the appellant could pick some form of skill which would be useful to him upon release. That would be a kind of rehabilitation for him (see *Reg v Sargeant* (1974) 60 Cr APP R 74). Further, the period would serve as a buffer and hopefully will sever the ties between him and his accomplice. If the appellant were to serve only a short period then at no time he could be back in business. That would defeat one of the aims of our justice system, namely, to allow an offender to turn to new leaf. A shorter period in custody may also prevent the appellant from undergoing such a change. Public interest, a paramount consideration, was also given its appropriate place. I noted that the learned magistrate did not expressly address such a factor in her deliberation.

Of course in so doing, I was well aware of some of the earlier decisions of the courts of this country on sentencing. Perhaps, I should refer to a few of them. In the case of *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167, the relevant parts in the judgment of his Lordship Mohd Azmi provide a good guide when he said this, at pp 169–171:

> When the legislature fixed a maximum penalty for an offence, the discretion of the court in determining the extent to which in a particular case the punishment should be awarded must be exercised judicially. ...
>
> In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and, fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrent does not justify the sentencer in passing a sentence of greater length than what the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence. As stated by James LJ in *R v Ladd & Tristam* [1975] Cr LR 50; *Thomas Encyclopaedia of Current Sentencing Practice* at p 1058:
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> > 'We have to look at the overall picture of what is the right sentence for the total involvement, the total degree of criminality involved, and we have to keep the sentences in perspective with the sentences that have been passed on other occasions for offences involving criminal activity of this kind, though of course varying in their gravity. Clearly a deterrent element has to be involved, but because the offences are very serious, it does not necessarily follow that on the particular facts very long sentences are justified.'
>
> A sentencer must give sufficient discount for all extenuating circumstances pertaining to the degree of culpability or criminality involved, which must necessarily vary from case to case apart from other mitigating factors. Unless there is a proper reason for withholding such credits, failure to do so may result in the sentencer not exercising his or her discretion judicially in assessing the level of custodial sentence. In *R v Meade* (1982) 4 Crim App R(S) 193; Cr LR 613, a young man who pleaded guilty to arson was granted a reduction in his sentence of six years' imprisonment in what would otherwise have been the proper sentence for such a serious offence. In the course of his judgment, Lord Lane CJ said:

A 'A term of five to six years, whatever the age of the offender may be, is in many cases of using a petrol bomb a perfectly appropriate sentence, because these weapons are rightly called bombs. They can cause the most fearful injuries and this case demonstrates the sort of damage they can cause to property. But having said that, the help that he gave to the police and his plea of guilty earn him a discount, which does not appear to have been given by the judge.'

B ...

It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence. In this particular case, apart from the plea of guilty, the sentence must also be discounted to reflect the full restitution made and

C the other mitigating factors. ...

It was wrong in principle to double without any good reason what would otherwise be an adequate and fair period of imprisonment. Since full restitution had been made and the appellant had not enriched himself personally by the crime, we found no purpose in imposing a fine in addition to custodial sentence.

D In *PP v Ravindran & Ors* [1993] 1 MLJ 45 there was quite an extensive discussion on the principles of sentencing. His Lordship Visu Sinnadurai J made the following observations at pp 50–53:

However, wide as this discretion may appear to be, the court must act judiciously in determining the sentence to be imposed. The court must act in

E accordance with the relevant sentencing practice.

A leading writer on sentencing policies in criminal law has aptly stated the following reasons as to why the courts are given such a wide discretion. Ashworth in *Judicial Independence and Sentencing Reform in the Future of Sentencing* (1982) Cambridge University Institute of Criminology at p 50 points out:

F 'The purpose of discretion is certainly to allow the sentencer to select the sentence which he believes to be the most appropriate in the individual case, considering both the facts of the case and any reports on the offender's character. The purpose of discretion is surely not to enable individual judges and magistrates to pursue purely personal sentencing preferences.'

G The various theories and principles applicable in sentencing are now well documented. However, one important feature which has repeatedly been emphasized is the public interest aspect of sentencing principles. Hashim Yeop Sani J (as he then was) said in *PP v Loo Choon Fatt* [1976] 2 MLJ 256 at p 257: 'One of the main considerations in the assessment of sentence is of course the question of public interest.' His Lordship quoted with approval the

H dictum of Hilbery J in *R v Kenneth John Ball*.

Abdoolcader J (as he then was) in *PP v Teh Ah Cheng* [1976] 2 MLJ 186 at p 187 observed:

'In sentencing generally the public interest must necessarily be one of the prime considerations ... public interest should never be relegated to the background and must of necessity assume the foremost

I importance.'

Raja Azlan Shah Ag LP (as his majesty then was) made the following observations in the Federal Court decision of *Bhandulananda Jayatilake v PP*

[1982] 1 MLJ 83, on an appeal against sentence for the offence of giving false testimony in court at p 84:

> 'He [the trial judge] took the course he did, in outweighing the plea of mitigation in favour of the public interest with a desire to uphold the dignity and authority of the law as administered in this country. We agree. That must receive the greatest weight. It is a serious offence to give false testimony, for it is in the public interest that the search for truth should, in general and always, be unfettered. The courts are the guardians of the public interest.'

It should be emphasized that whilst public interest plays an important role in sentencing practice, there are other important factors which a court needs to consider in imposing a particular sentence. Whilst it is recognized that no two cases may be the same, the exercise of the court's discretion should be in accordance with certain accepted principles or guidelines so as not to have too great a disparity in sentences for the same offence.

Of particular importance to the case at hand are the consideration of the following guidelines or principles involved in sentencing:

(i) discount or credit for the plea of guilty;

(ii) comparison of sentences in other cases for a similar offence;

(iii) disparity of sentence amongst the accused persons; and

(iv) mitigating factors relevant to the present case.

Discount or credit for the plea of guilty

It is an accepted rule of practice that an accused person should be given credit or discount for pleading guilty. The rationale for this rule is that much public time and money will be spared if an accused admits his guilt, thus avoiding a prolonged and unnecessary trial. This rule however, is not a strict rule as the courts may, in exercise of their discretion, in exceptional cases, refuse to grant any discount. The credit or discount to be given in favour of the accused person is not on the maximum sentence imposed by law but rather on a sentence which would have been imposed on the accused if he had claimed trial and had been found guilty. Cumming-Bruce LJ in *R v Boyd* above said:

> 'So one asks oneself, if there had been a plea of not guilty, and he had been convicted, what would have been the appropriate sentence?'

...

If two or more persons had either pleaded guilty or had been found guilty for the same offence committed jointly, the general rule is that any unjust disparity should be avoided. However, there is nothing to prevent the court from imposing a range of sentences on the accused persons if there are important considerations for so doing. The ages of the accused, the degrees of culpability and the differences in mitigation are amongst some of the important factors which warrant a disparity in sentences.

Bearing in mind the principles mentioned in the foregoing cases and in the light of what I have discussed above as regards the present cases, I am of the view that ordering the sentences of imprisonment to run consecutively is not excessive in the circumstances.

Accordingly, the above are my reasons for revising the order of the learned magistrate and ordering that the sentences imposed upon the

A appellant should be made consecutively and the number of strokes of the rattan increased.

Appeal dismissed and ordered the revision of the sentences save for two charges.

Reported by Peter Ling

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